STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 2009
v	No. 281998 Saginaw Circuit Court
MAURICE ANTWAN HAYNES, Defendant-Appellant.	LC No. 06-027536-FC

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of second-degree murder, MCL 750.317, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felon in possession of a firearm, MCL 750.224f, and carrying a concealed weapon (CCW), MCL 750.227. Defendant was sentenced as a second habitual offender, MCL 769.10, to a consecutive and preceding 2 years in prison for the felony-firearm convictions, as well as concurrent terms of 39 to 75 years in prison for the second-degree murder conviction and 47 to 90 months in prison for the felon-in-possession and CCW convictions. We affirm.

Defendant first argues that the trial court erred in admitting a prosecution witness's prior inconsistent videotaped statement. Defendant failed to preserve this issue below. Under *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999), an unpreserved or forfeited claim of error, whether nonconstitutional or constitutional in nature, is reviewed for plain error affecting substantial rights. The *Carines* Court set forth the plain-error test, stating:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation

of judicial proceedings' independent of the defendant's innocence." [*Id.* at 763 (citations omitted; alteration in original).]

Assuming error in admitting some or all of the challenged statement, see MRE 613(b) and *People v Kilbourn*, 454 Mich 677, 682-683; 563 NW2d 669 (1997), defendant has failed to show the requisite prejudice, nor did the presumed error result in the conviction of an actually innocent person or compromise the integrity of the proceedings. While there were some identification and description issues, defendant admitted that he was at the scene around the time of the shooting talking to the victim, whom he knew,[1] defendant's palm print was found on the victim's vehicle, and another witness testified that the victim identified defendant by name as the shooter in a dying declaration. Furthermore, a resident at Birch Park Townhomes testified that she was getting ready to go out when she heard tires squeal in the parking lot. She looked out of her window and saw the victim driving a car into Birch Park. A few seconds later, she saw a newer model, silver Cadillac[2] drive into the Birch Park exit, and it appeared to be chasing the victim's vehicle. The resident further testified that she saw a man get out of the Cadillac and say something to the victim like, "Where's my shit?" She then heard three gunshots and saw the victim get out of the car and walk toward his townhouse, holding himself. The resident testified that the shooter then drove quickly out of the complex. She additionally testified that she told a police detective in May or June 2006 that the shooter looked like "a guy named Maurice," although she could not say for certain. The vehicle identified by the resident and the maintenance man was a rental vehicle and had been rented out to defendant's mother. She was stopped while attempting to return the vehicle to the rental agency on the day of the shooting, claiming that she was returning the car early because an indicator light had come on. The police started the vehicle and let it run for 15 minutes; however, no indicator lights came on. Reversal is unwarranted under the plain-error test.[3]

Defendant next argues that he was denied his constitutional right to present a defense by the trial court's repeated refusal to allow him to present evidence to support his defense that another person was the shooter. Specifically, defendant argues that the trial court erred in refusing to admit (1) testimony regarding the victim's trouble with people at his apartment complex, (2) testimony that the victim was a confidential informant for the Saginaw police, (3) a 911 tape reporting that the shooter in this case left the area on foot, and (4) the medical examiner's testimony that there was no evidence of gun powder or stippling on the victim's clothing. The right to present a defense extends only to relevant and admissible evidence. See

---

[1] Defendant claimed that, when he was speaking to the victim, a black male with a gun came upon the scene and spoke to the victim in a confrontational manner, whereupon defendant, being scared, left the scene, at which time he heard gunshots. Defendant did not contact the police about the incident.

[2] A maintenance man also described a newer model Cadillac as leaving the complex after gunshots were heard, and he took down the vehicle's license plate.

[3] We also note that the witness testified, after the playing of the videotape, that everything he stated on the videotape came from transcripts that he had read about defendant's case, and he additionally stated that he would have said anything the prosecutor wanted to hear in order to avoid prison.

People v Hackett, 421 Mich 338, 354; 365 NW2d 120 (1984). A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

"[E]vidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create more than a mere suspicion that another was the perpetrator." *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987). Evidence of third-party guilt may be introduced by the defendant when it is inconsistent with, and raises a reasonable doubt about, the defendant's guilt. *Holmes v South Carolina*, 547 US 319, 327; 126 S Ct 1727; 164 L Ed 2d 503 (2006). However, such evidence should be excluded where it does not sufficiently connect the other person to the crime, such as where the evidence is speculative or remote, where it does not tend to prove or disprove a material fact in issue, where it has no effect other than to cast a bare suspicion upon another person, or where it raises a conjectural inference regarding the commission of the crime by another person. *Id*. at 327-328. "Before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." *Id*. (citations and quotations omitted).

Defendant attempted to admit testimony regarding the victim's trouble with his neighbors and his alleged status as a confidential informant to show that the he was involved with drugs, including a controlled buy in 2001, which in turn supported an inference that others had a motive to shoot him. We conclude that the trial court did not abuse its discretion in failing to admit the evidence. The evidence sought to be admitted cast a mere or bare suspicion on others generally and was insufficient to connect, in any concrete fashion, a particular person or persons to the crime; the evidence was tenuous at best. The evidence was too remote and speculative, and it did not clearly point to another person as the guilty party. Any inference that another person was the perpetrator would be conjectural absent additional evidence, which was not provided, establishing a connection between the crime and another person.[4]

As for the 911 tape, the court concluded that it was hearsay and not a "proper line of questioning" for the detective who was to be asked about its contents. While defendant challenges the hearsay aspect of the trial court's ruling, he does not address foundational aspects of admitting the 911 tape through the detective. See MRE 901. Moreover, it is clear that defendant sought admission to prove the truth of the matter asserted, and the record and appellate argument are lacking in showing that all of the requirements of the present-sense-impression exception to hearsay, MRE 803(1), were satisfied. Reversal is unwarranted.

Finally, defendant sought to admit testimony from the medical examiner regarding the absence of stippling or sooting on the victim's clothing. After the medical examiner testified that

[4] With respect to the bias component of defendant's argument, we fail to understand the logic of defendant's reasoning that the victim's alleged work as a confidential informant against the brother of the witness who testified about the victim's dying declaration identifying defendant showed bias of the witness against defendant. Under the alleged circumstances, it would seem that any bias by the dying-declaration witness would be against the victim, not defendant. The trial court's ruling did not constitute an abuse of discretion.

he never tested the victim's clothing for gunpowder evidence, the prosecution requested that he be allowed to do an impromptu testing, and over defense objections as to relevance, the trial court allowed it. Out of the presence of the jury, the medical examiner stated that he was unable to detect any stippling or sooting with the naked eye, but admitted that there may be some that could be detected by the lab. Defense counsel then withdrew his objection and moved for admission of the evidence. The trial court refused to admit the evidence, concluding that it was irrelevant and had the potential for misleading the jury. MRE 403. Under these circumstances, and given the equivocal nature of the proposed testimony, the court's decision to exclude it was within a range of principled outcomes, and thus it did not constitute an abuse of discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

We also reject defendant's argument that he was denied his right to due process by four alleged instances of prosecutorial misconduct. Three of the assertions were preserved below. His final assertion, however, is unpreserved and will be reviewed for plain error affecting substantial rights. *Carines*, *supra* at 763-764. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant's first two preserved challenges to the prosecutor's conduct stem from closing arguments. Defendant contends that he was denied a fair trial when the prosecutor stated that defense counsel should have prefaced his closing argument with the statement, "Tonight we're traveling to fantasyland." While a prosecutor may not question defense counsel's veracity or suggest that defense counsel is intentionally attempting to mislead the jury, *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008), we find that the prosecutor's comment was directed at and related to defendant's theory of defense, not to or about defense counsel. The comment is a clear denigration of the theory, but does not suggest that defense counsel is intentionally misleading the jury. Moreover, a prosecutor is not required to make an argument in the blandest possible terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). In any event, the trial court properly instructed the jury that the lawyers' statements and arguments were not evidence that could be considered during deliberations. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Next, defendant argues that he was denied his right to a fair trial when the prosecutor addressed the jury as follows: "Ladies and Gentlemen, once again, I am telling you that in my mind, we've proven this case beyond a reasonable doubt." Defendant cites the well-established proposition that a prosecutor may not express his personal belief in a defendant's guilt. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). However, the prosecutor was merely arguing that it was his belief that the evidence presented at trial had established the prosecution's case beyond a reasonable doubt. Such an argument is not improper. *Id.* at 282 (prosecutors are free to argue that the evidence and all reasonable inferences arising from the evidence support their theory of guilt).

Defendant further argues that he was denied a fair trial when the prosecutor impermissibly used his post-custody silence against him during both defendant's cross-examination and the prosecutor's closing argument. However, the challenged comments by the prosecutor were directed at defendant's failure to contact police and inform them that he was a witness to the crime. In *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003), this

Court observed:

> First, the right against self-incrimination prohibits a prosecutor from commenting on the defendant's silence in the face of accusation, but does not curtail the prosecutor's conduct when the silence occurred before any police contact. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Thus, a prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true. *Id.*

Defendant testified that he was at the scene when the victim, his friend, was shot and that he simply left and never reported the crime. Defendant was not denied a fair and impartial trial by the prosecutor's conduct.[5]

In his unpreserved assertion of prosecutorial misconduct, defendant contends that the prosecutor impermissibly questioned defendant about another witness's credibility. "[I]t is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact." *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988). Having reviewed the cited exchange between the prosecutor and defendant, we tend to believe that the prosecutor's questions, as specifically framed, were not improper. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003) (prosecutor was permitted to ask the defendant whether he had a different version of the facts and to attempt to ascertain which facts were in dispute). Regardless, assuming error, it did not amount to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Next, defendant argues that the trial court erred in admitting hearsay testimony regarding the victim's statement that defendant shot him. Specifically, defendant contends that the testimony does not qualify as either a dying declaration or an excited utterance, and defendant's pretrial motion to exclude the testimony should have been granted. We review for an abuse of discretion a trial court's admission of evidence under a hearsay exception. *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007).

"Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted." *Id.* at 3, citing MRE 801(c). Hearsay is inadmissible unless otherwise made admissible by the rules of evidence. *Stamper, supra* at 3. MRE 804(2) provides the following hearsay exception for dying declarations:

> In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

[5] To the extent that the questioning and closing argument on the issue strayed into a time period following police contact, we cannot conclude that any error harmed or prejudiced defendant. MCL 769.26; *Lukity, supra* at 495.

"MRE 804(b)(2), by its explicit terms, imposes the requirement that the declarant be under the belief that his or her death was imminent." *People v Orr*, 275 Mich App 587, 595; 739 NW2d 385 (2007). "If the surrounding circumstances clearly establish that the declarant was *in extremis* and believed that his death was impending, the court may admit statements concerning the cause or circumstances of the declarant's impending death as substantive evidence under MRE 804(b)(2)." *Stamper*, *supra* at 4.

While "[i]t is fundamental that a 'dying declaration' is inadmissible in evidence, unless made under a solemn belief of impending death," *People v Johnson*, 334 Mich 169, 173; 54 NW2d 206 (1952), "it is not necessary for the declarant to have actually stated that he knew he was dying in order for the statement to be admissible as a dying declaration," *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988). All of the existing and surrounding circumstances, including "the apparent fatal quality of the wound," can establish and prove that a declarant believed that death was impending and imminent. *People v Schinzel*, 86 Mich App 337, 343; 272 NW2d 648 (1978), rev'd in part on other grounds 406 Mich 888 (1979).

Here, the witness testified that the victim was holding his chest and bleeding when he identified defendant as his assailant. The victim stated that defendant "got me." Another witness observed that the victim was bleeding and in a lot of pain. Police officers responding to the scene described the dire physical condition the victim was in when they arrived. Considering the totality of the circumstances, we conclude that sufficient evidence existed showing that the victim believed he faced imminent death when he identified defendant as the man who shot him. Because the testimony was properly admitted as a dying declaration, defendant's excited utterance argument need not be addressed.

Finally, defendant argues that he was denied his right to an impartial jury drawn from a fair cross-section of the community because his jury pool only consisted of four African-American jurors. Defendant contends that African-Americans were systematically excluded from the jury venires in Saginaw County. Defendant further argues that his counsel was ineffective for failing to object to the make-up of his jury.

"A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *People v Hubbard* (*After Remand*), 217 Mich App 459, 472; 552 NW2d 493 (1996). "[T]he Sixth Amendment guarantees an opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community." *Id*. at 472-473. But a particular jury array does not have to mirror the community exactly. *People v Howard*, 226 Mich App 528, 532-533; 575 NW2d 16 (1997); *Hubbard*, *supra* at 472. To establish a prima facie violation of the fair-cross-section requirement, the defendant must show:

> "(1) that the group alleged to be excluded is a 'distinctive group' in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in

> the jury-selection process." [*Id.* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Here, defendant has satisfied the first element of the *Duren* test. "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *Hubbard, supra* at 473. However, defendant has not satisfied the second element of the test. Defendant supports his argument that the African-American community was substantially underrepresented in his jury venire by referring this Court to the fact that African-American adults make up 16.5 percent of Saginaw County's adult population, yet only four African-American jurors were present in defendant's jury venire. But even if there was a disparity between the number of African-Americans included in his jury venire and the number residing in the community, "[m]erely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *Howard, supra* at 533. Defendant has failed to present any evidence of the actual racial make-up of his jury venire or regarding jury venires in Saginaw County generally. See *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000).

Defendant has also failed to satisfy the third element of the *Duren* test, which requires him to show that the underrepresentation of African-Americans was due to their systematic exclusion from the jury-selection process in Saginaw County. *Hubbard, supra* at 473. Defendant failed to present any evidence regarding Saginaw County's jury-selection process. Instead, he relied on the disparity between the number of African-Americans in the Saginaw community and the number that were in his jury array. "[I]t is well settled that systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate." *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Rather, defendant must demonstrate some problem inherent in the selection process that results in systematic exclusion. *Hubbard, supra* at 481. Defendant has failed to meet this burden.

Defendant also argues that his counsel was ineffective for not objecting to the underrepresentation of African-Americans on defendant's jury. Defendant failed to properly present this issue by raising it in his statement of questions presented, so we need not reach it. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, considering defense counsel's action in light of the existing record, there is insufficient evidence to conclude that defense counsel acted below an objective standard of reasonableness with respect to the jury venire. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The record does not indicate the ethnicity of any of the venire members, and there is no evidence of the systematic exclusion of African-Americans from jury pools in Saginaw County. Conversely, the record does show that defense counsel carefully and diligently questioned the prospective jurors. Defendant has failed to show that counsel provided ineffective assistance at trial.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood